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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| CARLOS BRAIN,<br>Plaintiff and Appellant,<br>v.<br>JOHNRE CARE, LLC et al.,<br>Defendants;<br>JOHNNY SICAT et al.,<br>Interveners and Respondents. | E068045<br>(Super.Ct.No. MCC1400132)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Gloria Connor Trask, Judge. Affirmed.

The Law Offices of Edward P. Kerns and Edward P. Kerns for Plaintiff and Appellant.

Emilio Law Group, Daniel G. Emilio and Laurie M. Cortez, for Defendants, Interveners, and Respondents.

Plaintiff appeals, challenging the trial court's jurisdiction to proceed on the defendants' motion to fix value and purchase plaintiff's minority share. We affirm.

## BACKGROUND

In 2006, plaintiff and the individual defendants, John and Rebecca Sicat, entered into an agreement to operate one or more skilled nursing facilities and residential care facilities for the elderly. Pursuant to the agreement, the parties formed two Limited Liability Companies, JohnRe Care, LLC, and JohnRe Management, LLC, of which plaintiff owned a 25 percent membership interest and the individual defendants owned the remaining 75 percent. The purpose of the two entities was to operate skilled nursing facilities for the elderly.

The operating agreement provided that the company (the LLC) could be dissolved (a) upon determination by members owning more than 50 percent of the interests in the company, (b) on the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member, unless at least 50 percent of the remaining members consent to continuation of the company within 90 days of the dissolution event.

On January 27, 2014, plaintiff filed a complaint for dissolution and winding up of the affairs of the LLC due to internal dissension and mismanagement or abuse of authority. On May 14, 2014, an answer to the complaint was filed by the LLC, along with a notice of election to purchase the membership interest of the minority interest holder, plaintiff.

The parties signed an agreement to retain the Mentor Group to appraise the value of Brain's interest in the companies, and after the appraisal was completed, the Sicats tendered an offer to purchase Brain's interest.[1] Brain did not respond to the offer, so on May 26, 2015, the Sicats, by and through the LLC, filed a motion to confirm the valuation, as provided in Corporations Code, section 17707.03, subdivision (c). A hearing date was set.

On June 11, 2015, plaintiff filed a request for voluntary dismissal of his entire action, and upon entering the dismissal, apparently the court vacated the LLC's motion hearing date on its own motion.[2] The LLCs made an ex parte application for relief from the court's action of vacating the defendant's motion, on the ground that dismissal of the dissolution action did not impact an election pursuant to Corporations Code section 17707.03, subdivision (c)(6), which was granted. The matter then proceeded on the LLCs' motion to approve the valuation and proposal to purchase the plaintiff's

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[1] While the dissolution action was pending, Brain also brought a shareholder derivative action on behalf of the companies against the law firm representing the LLC, alleging causes of action for conversion, claim and delivery, two counts of breach of contract, and professional negligence. Also, a derivative action was filed by Brain, and JohnRe Care, LLC, along with JohnRe Care Management, LLC, against the Sicats, alleging seven causes of action relating to the Sicats' activities in running the companies. We take judicial notice of two unpublished decisions in separate appeals involving the plaintiff and defendants. (*Brain v. Emilio Law Group* (Aug. 15, 2018, No. G054238), nonpub. opn., 2018 Cal.App.Unpub. Lexis 5548; *JohnRe Care, LLC v. Sicat* (December 11, 2017, E065191, E065892), nonpub.opn.)

[2] The minutes relating to the filing of the request for dismissal do not include any separate request to vacate the hearing date, and there is no additional entry reflecting any action by the court. However, based on the LLC's subsequent action, apparently the court vacated the hearing date on its own motion.

membership interest but it was denied for reasons not elucidated by the voluminous record before us.

On July 15, 2015, the LLC made a motion for appointment of appraisers and procedure to ascertain and fix the fair market value of plaintiff's membership interest, which was granted over objection by the plaintiff. On August 22, 2016, a year later, the LLC made a motion under Corporations Code section 17707.03, subdivision (c), to fix the value of the business and to purchase the plaintiff's membership interest in the LLC. That motion was denied without prejudice because defense counsel was not counsel of record for the individual defendants. To remedy this problem, the individual defendants filed a motion to intervene, which was granted. At the same hearing, the court denied, without prejudice, the defense motion to fix value purchase membership interest. Although the minutes do not explain the reason for the denial, plaintiff's opposition to the motion attacked the LLC's standing to bring the motion.

On October 12, 2016, after the complaint in intervention[3] by the Sicats was filed, the individual defendants filed another motion to fix value and to purchase the plaintiff's membership in the LLC. This motion was denied without prejudice as premature. On November 30, 2016, the individual defendants filed their final motion to fix value and purchase plaintiff's membership interest in the LLC. The motion was granted on

[3] The minutes reflect that plaintiff filed a motion to quash service of the summons and complaint in intervention, which was denied on December 8, 2016. Plaintiff filed a petition for writ of mandate from this order in this court, on December 15, 2016. (E067367, *Brain v. Superior Court* [incorrectly captioned as *Brain v. Hon. Gloria Trask*].) We summarily denied the petition December 22, 2016.

February 3, 2017. The value of plaintiff's 25 percent interest was fixed at $27,666.33, and defendants' motion to purchase that interest was approved.

On March 29, 2017, plaintiff appealed.

## DISCUSSION

On appeal, plaintiff raises a single issue challenging the trial court's authority to proceed on the collective defendants' election to seek a valuation of the LLC and the order authorizing the individual defendants to purchase plaintiff's membership interest. Essentially, plaintiff posits that once he filed his voluntary request for dismissal, the trial court lacked jurisdiction to act. We disagree.

Code of Civil Procedure section 581 authorizes a plaintiff to dismiss an action, with or without prejudice, and without the consent of other parties or leave of court, prior to the action commencement of trial. (C.C.P. § 581, subds. (b), (c).) Generally, under that code section, "where no affirmative relief has been sought in the pleadings, the privilege of dismissing belongs to the plaintiff and may be exercised by him without the knowledge of the other parties or the consent of the court." (*Roski v. Superior Court* (1971) 17 Cal.App.3d 841, 845.)

Pursuant to Code of Civil Procedure section 581, subdivisions (b) and (c), plaintiffs have the right to voluntarily dismiss an entire action, or causes of action within a pleading, before commencement of trial, and neither the clerk nor the trial court has any discretion in the matter. (*Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 876, citing *Aetna Casualty & Surety Co. v. Humboldt Loaders, Inc.* (1988) 202

Cal.App.3d 921, 931.) In such cases, the trial court loses jurisdiction to act in the case, except for the purpose of awarding costs and statutory attorney fees. (*Law Offices of Andrew L. Ellis, supra,* 178 Cal.App.4th at p. 876; see also *Conservatorship of Martha P.* (2004) 117 Cal.App.4th 857, 866.)

The rule is not absolute. It is subject to an exception where affirmative relief has been sought by way of cross-complaint. (C.C.P. § 581, subd. (h); *In re Marriage of Tamraz* (1994) 24 Cal.App.4th 1740, 1747 (*Tamraz*).) While the statutory amendment refers only to "cross-complaint," the term has been interpreted more broadly. "Affirmative relief for purposes of Code of Civil Procedure section 581 is 'the allegation of new matter which in effect amounts to a counterattack.' [Citation.]" (*Tamraz, supra,* at p. 1747; *Wilson v. L.A. County Civil Service Com.* (1954) 126 Cal.App.2d 679, 682.) That allegation of new matter may be made in an answer to the complaint or a special proceeding. (See *Tamraz, supra,* 24 Cal.App.4th 1747; see also, *Gray v. Superior Court* (1997) 52 Cal.App.4th 165, 172-173.)

In *Tamraz,* the husband filed the dissolution action, and the wife responded by filing a motion for entry of judgment based upon the marital settlement agreement. After an unsuccessful attempt at reconciliation, wife filed for dissolution and requested that the court enter judgment *nunc pro tunc* in the prior action that had incorporated the marital settlement agreement. At that point, husband dismissed the original proceeding. In granting relief to wife, the reviewing court concluded wife's motion in the original dissolution matter plainly requested affirmative relief different from what husband sought

and the filing of her motion to enter judgment there precluded husband's unilateral dismissal of the dissolution action. (*Tamraz, supra,* 24 Cal.App.4th at p. 1748.)

In reaching its conclusion, the court acknowledged the 1970 legislative amendment which had deleted "answer" from the language of Code of Civil Procedure, section 581, but concluded that the *sine qua non* of preventing voluntary dismissal has remained the opposing party's claim for affirmative relief regardless of the form that claim may take. (*Tamraz, supra,* 24 Cal.App.4th at p. 1747.) The expression "affirmative relief sought" therefore does not include mere defensive matter, but affirmatively and positively seeks to defeat plaintiff's cause of action. (*Wilson v. Los Angeles County Civil Service Com., supra,* 126 Cal.App.2d at pp. 682-683.) The court in *Tamraz* followed *Wilson,* explaining that the deletion of the word "answer" from the provisions of section 581 was originally intended as part of a cleanup of legislation following the abolishment of counterclaims, which left "cross-complaints," "where affirmative relief has been sought." (*Tamraz, supra,* 24 Cal.App.4th at p. 1747.)

In *Gray v. Superior Court, supra,* 52 Cal.App.4th 165, the plaintiff filed an action to partition property by sale, and defendant answered the complaint with a prayer seeking partition by division. After a referee was appointed and had begun reviewing evidence, the plaintiff voluntarily dismissed the complaint. Defendant filed a motion to vacate the dismissal, which was reluctantly denied, but the reviewing court reversed the order. The court concluded that the plaintiff's right to voluntarily dismiss was cut off by the commencement of proceedings in front of the referee and that the defendant's prayer for

partition by division constituted a request for affirmative relief, precluding voluntary dismissal.

The present case is in a similar position, where the answer to the complaint included a notice of election to purchase plaintiff's membership interest (it was even mentioned in the title of the document). It was followed by the appraisal of the LLCs by stipulation of the parties, prior to defendants filing their motion for approval of the valuation and purchase, all of which occurred before plaintiff filed his voluntary dismissal of the complaint. Defendants' election to purchase plaintiff's membership interest constitutes a request for affirmative relief, within the meaning of the governing authorities.

Plaintiff relies heavily on the decision of *Roski v. Superior Court* (1971) 17 Cal.App.3d 841, involving a subrogation action to seek reimbursement to the insurer for compensation payments made to a worker against the owners of the building (Roski). There, settlement negotiations resulted in the insurer filing a voluntary dismissal pursuant to Code of Civil Procedure section 581, subdivision (*1*). Six months later, the injured worker filed a motion to vacate the dismissal (Code Civ. Proc., § 473), to file his complaint in intervention for personal injuries, which was granted.

The petitioner, Roski, sought relief in mandate to compel an order vacating the order setting aside the dismissal, on the ground the injured worker had not been a party to the insurer's action, so he could avail himself of relief pursuant to Code of Civil Procedure, section 473, and he had not sought affirmative relief prior to the entry of the

dismissal. (*Roski*, *supra*, 17 Cal.App.3d at pp. 845-846.) There, the reviewing court held that the injured worker had not attempted to intervene prior to the dismissal.

The instant case is easily distinguishable because (a) the defendants sought affirmative relief by serving notice of their election to purchase plaintiff's membership share and filing a motion to approve the valuation and proposal to purchase *prior* to the entry of the dismissal, and (b) the right to pursue that relief statutorily survives any attempt to dismiss the action. (Corp. Code, § 17707.03, subd. (c)(6).) In our view, the filing of the motion for approval of the valuation and proposal to purchase the plaintiff's membership interest can be viewed as either a separate procedure seeking affirmative relief, independent of the defendant's answer, or the commencement of trial which cut off plaintiff's right to voluntarily dismiss. (See *Gray v. Superior Court*, *supra*, 52 Cal.App.4th at p. 172.)

Pursuant to the statute, "[i]f the purchasing parties elect to purchase the membership interests owned by the moving parties, . . . the court, upon application of the purchasing parties, either in the pending action or in a proceeding initiated in the superior court of the proper county by the purchasing parties, shall stay the winding up and dissolution proceeding and shall proceed to ascertain and fix the fair market value of the membership interests owned by the moving parties." (Corp. Code, § 17707.03, subd. (c)(2).) "A dismissal of any suit for judicial dissolution by a manager, member, or members shall not affect the other members' rights to avoid dissolution pursuant to this

section." (Corp. Code, § 17701.03, subd. (c)(6); see also, *Kennedy v. Kennedy* (2015) 235 Cal.App.4th 1474, 1487.)

In other words, once the election to valuate and purchase the minority member's share is commenced, the dismissal of the judicial dissolution action cannot prevent the buyout procedure from going forward. (*Kennedy v. Kennedy, supra,* 235 Cal.App.4th at p. 1487; 30 Cal. Forms of Pleading and Pract. § 346.20 (2018).) In *Kennedy,* the denial of defendant's motion to stay the dissolution and to appoint appraisers was based on the fact the provisions of Corporations Code section 17707.03 were not in effect at the time the complaint was filed.

Here, the statute was operative at the time the complaint was filed by plaintiff, so defendants were authorized to proceed with efforts to buy out plaintiff, notwithstanding the plaintiff's dismissal of the complaint. The matter had proceeded to appraisals by stipulation of the parties until plaintiff refused defendants' proffered purchase price and decided to voluntarily dismiss the complaint. The trial court vacated the dismissal as to the motion for approval of the valuation and proposal to purchase the plaintiff's membership upon the defendants' application, and plaintiff did not seek review of that order.[4] To hold that defendants could not proceed with their election to buy out

[4] At oral argument, plaintiff asserted that the original answer and election to valuate and purchase plaintiff's share were filed by the LLCs, not the individual members, rendering the election void and depriving the trial court jurisdiction to entertain the defense motion. However, no issue of standing was raised in the trial court or in the briefs on appeal, so that issue is forfeited. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956; see also, *Harnedy v. Whitty* (2003) 110 Cal.App.4th 1333, 1338.)

plaintiff's interest would be to frustrate the purpose of the statutory provisions governing the dissolution and winding up of a limited liability company.

The trial court was not deprived of jurisdiction to proceed on defendant's election.

**DISPOSITION**

The judgment is affirmed. Respondents are entitled to costs on appeal.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

RAPHAEL
J.